89-761

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a denial to a public employee of a promotion due to his political beliefs or political affiliation violates the First and Fourteenth Amendments.

2. Whether conditioning a promotion of a public employee upon the political support of, or financial contribution to, a favored political party violates the First and Fourteenth Amendments.

3. Whether retaliation against a public employee because, acting in his self-interest, he filed a charge regarding a matter of public concern-reverse discrimination in the preferential treatment of a female employee - violates the First and Fourteenth Amendments.

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

EDWARD E. RICE, a public employee with the Ohio Department of Transportation, a state agency.

Respondents:

DAVID L. WEIR, Director of the Ohio Department of Transportation,-/ individually and in his official capacity.

PATRICK McCRAY, Deputy Director, Administrative Affairs of the Ohio Department of Transportation, individually and in his official capacity.

-/ The Ohio Department of Transportation is not a party for purposes of this Petition or the appeal before the Sixth Circuit. The Agency was originally named a defendant pursuant to the Age Discrimination in Employment Act, 29 *United States Code* §615. Pursuant to a Rule 41(a) motion, Federal Rules of Civil Procedure, the age claim was voluntarily dismissed in the district court.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Edward E. Rice, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on October 13, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported. The opinion is reprinted in the appendix.

JURISDICTION

This cause arose under 42 *United States Code* §1983 and §1985.-/ The United States District Court for the Southern District of Ohio had jurisdiction under 28 *United States Code* §1331, §1343. On January 22, 1986, the District Court granted the respondents' motion for summary judgment, and the petitioner appealed.

The Court of Appeals for the Sixth Circuit had jurisdiction of this cause under 28 *United States Code* §1291. On October 13, 1989, the Sixth Circuit affirmed the District Court's summary judgment order and held that the failure of the petitioner, a public employee, to receive a promotion because he did not contribute to the Republican Party is not unconstitutional. The Sixth Circuit essentially held that this Court's precedent only reached employment decisions tantamount to a discharge. Thus, the First and Fourteenth Amendments were not violated when employment or promotion was conditioned upon political belief or political affiliation.

The Sixth Circuit also held that it is constitutional for a public employer to retaliate against a public employee by denying him a promotion because he previously filed a reverse sex discrimination charge. The Sixth Circuit treated the charge as speech of a private rather than a public concern.

The Court has jurisdiction to review this case under 28 *United States Code* §1254.

-/ The petitioner does not raise §1985 as an issue before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 *United States Code* §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Edward E. Rice, has been employed by the Ohio Department of Transportation (ODOT) since May 1, 1969. He is presently a Personnel Officer III in the District 8 office of the Department located in Lebanon, Ohio. He was initially employed as a Personnel Officer I.

In September 1976, the petitioner filed a charge of sex discrimination against the Department for their failure to upgrade him in favor of a less qualified, female employee. The discrimination charge was settled between the parties in exchange for a future promotion for petitioner to Personnel Officer III. In 1978, the petitioner was promoted to a Personnel Officer III position, a classified position.

During the period 1975 to 1982, the petitioner was requested by the deputy director of District 8, the chief supervisor in the office, to fill-in as an administrative assistant (the next higher-rated position and an unclassified position) on a temporary basis without receiving the higher pay. In August 1981, the permanently assigned administrative assistant became ill and obtained a leave of absence. The deputy director of District 8 appointed the petitioner to fill the administrative assistant position on a temporary basis, prepared the paperwork for him to do so, and sent it for approval to the director of the department, respondent Weir, in Columbus and the deputy director, respondent McCray. Three days later, respondents Weir and McCray ordered the district deputy director to rescind the appointment.

Petitioner "unofficially" performed the duties of an administrative assistant in any event without receiving the higher pay.

The incumbent administrative assistant never returned to work because of ill health and a vacancy was declared. After the petitioner made known his desire for the vacant job, the job was given to Andrew Siehl, son of the Republican County Chairman of Preble County, Ohio. The district deputy director objected to the appointment of Mr. Siehl because he was not qualified to perform the job duties and said the petitioner was more qualified.

In August 1982, Siehl left the position on a temporary basis to work on a political campaign. Petitioner, becoming aware of Siehl's leave of absence, telephoned respondent McCray and verbally informed him of his interest in the position. Thereafter, on September 5, 1982, a Mr. Fife was appointed to the position. Fife, a classified employee, had been a subordinate to the petitioner. According to the district deputy director, Fife was also less qualified than the petitioner for the position.

The district deputy director then informed the petitioner that the reason he did not receive the position was because he did not contribute to the Republican Party and because he had filed a reverse sex discrimination charge against the Departmen When questioned by the petitioner as to the reason he did not receive the promotion, respondent McCray point blank told the petitioner that the reason he did not get the position was because he had *failed to contribute to the Republican Party*. Petitioner had previously been told in 1978 by the administrative assistant, his immediate supervisor, that anyone expecting a promotion must contribute to the governor's campaign.

Coupled with the statements was the written policy of ODOT which set forth the political considerations for hiring Republicans. The policy required a preference for Republicans over Democrats for Ohio Department of

Transportation job positions, and in particular, Republicans who contributed to the Party were given a preference over all others, including Republicans who did not contribute to the Party. The written policy stated:

> "Every attempt will be made by the District to hire in accordance with the following priorities: (a) Republicans; (b) un-committed; (c) un-requested; (d) Democrats. In every instance the District will attempt to hire (when a choice exists) a Republican who has worked and contributed in preference to a 'single vote'." *(Exhibit J)*

This policy was extended to promotions by respondents Weir and McCray. The petitioner was told by respondent McCray that he would not be considered for the administrative assistant position because he did not contribute to the Republican Party.-/

-/The petitioner filed his lawsuit in the United States District Court on December 23, 1982, during the period when the Republican Administration was about to give up power to the Democratic Administration. Thereafter the petitioner was a recipient of several additional retaliatory actions taken against him, (besides the denial of the promotion) including decreasing his job responsibilities, threats of dismissal, moving him to a smaller office and requiring him to face the wall, and receipt from his supervisors of verbal harassment in front of other employees.

Officials of the Department (then under the Democratic Administration which took over on January 1, 1983, after petitioner filed this lawsuit) attempted to bribe co-workers to have them proffer false testimony that petitioner was selling "promotions and jobs" in order to discharge the petitioner. The co-workers were promised promotions if they would do so and if the co-workers changed their political allegiance from Republican to Democrat.

In 1983, the Democratic leadership applied the same partisan policy as the Republicans, except preference was given to Democrats. Thus, the petitioner found himself in a position where it was no longer Republican versus Republican, but Democrat versus Republican. The petitioner attempted to amend the complaint after the Democrats took charge, but the district court denied the amendment.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court of Appeals For The Sixth Circuit In This Case Is In Direct Conflict With The Decisions Of Other Circuit Courts of Appeal.

A. This Court Has Granted The Writ On An Identical Issue In *Rutan v Republican Party Of Illinois*

On October 3, 1989, this court granted the writ in *Rutan v. Republican Party of Illinois*, 58 L.W. 3185 (October 3, 1989). The questions presented before the court in *Rutan* are identical to questions 1 and 2 presented in this Writ regarding the promotion issue.

B. The Courts of Appeal Are Sharply Divided As To Whether Denial Of Employment Rights, i.e. Promotion, Due To Political Beliefs And Political Affiliation Violates First Amendment Rights.

In the *Rice* decision, the Sixth Circuit followed its July 25, 1989, decision in *Messer v. Curci*, 881 F2d 219 (6th Cir. 1989), (en banc) and held in *Rice* that:

> *Messer* draws a sharp distinction between politically motivated firings and other types of personnel decisions — failure to hire or rehire, e.g. — based on political considerations. As far as hiring decisions are concerned, we held, the 'allegation of political patronage . . . standing alone does not state a claim for violation of 42 *U.S.C.* §1983. *Messer v. Curci*, 881 F2d at 220.
>
> *Messer* is controlling here. We see no meaningful distinction, in the present context between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendant's decision not to promote Mr. Rice was the product of precisely the sort of

> preference for political supporters in government employment that we found constitutionally permissible in *Messer*. (A-5,6)

The decisions in two other circuits, *Rutan v. Republican Party of Illinois*, 868 F2d 943, 951-954 (7th Cir. 1989), (en banc), and *Delong v. United States*, 621 F2d 618, 624 (4th Cir. 1980) follow the Sixth Circuit. These decisions conflict with *Bennis v. Gable*, 823 F2d 723 (3rd Cir. 1987), [Court held First Amendment's reach extended to disciplinary action, i.e. demotion and transfer] *Waters v. Chaffin*, 684 F2d 833 (11th Cir. 1982), [Court held disciplinary demotion and transfer protected by First Amendment] and *Lieberman v. Reisman*, 857 F2d 896, 900 (2nd Cir. 1988). [Court held First Amendment's reach extended to political retaliation, i.e. refusal to pay earned compensation and vacation time and because of political activities]. Thus, state public employers in the Fourth, Sixth, and Seventh Circuits may discriminate on the basis of political belief and political affiliation, but state public employers in the Second, Third, and Eleventh Circuits may not.

In *Rutan v. Republican Party of Illinois*, Judge Ripple dissented and presented the dilemma:

> In this bob-tailed en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. *Id.* at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh, and Atlanta can expect protection when a local politician makes life

> uncomfortable because they do not knuckle under to his political will — even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual." 868 F.2d at 959.

This court must ultimately decide the correct legal standard for politically-motivated employment decisions by state public employers other than discharge, held to be illegal in *Branti v. Finkle*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1975).

II. The Sixth Circuit's Decision, Holding Constitutional Retaliatory Conduct By Public Officials Against A Public Employee Because He Filed An Individual Reverse Sex Discrimination Charge — A Matter Of Public Concern — Is In Direct Conflict With The Eighth Circuit.

The Sixth Circuit in *Rice v. Ohio Dept. of Transportation* held that the First Amendment does not convert a public employee's individual charge of reverse sex discrimination into a matter of "public concern" so as to be protected by the First Amendment against any retaliatory action. A conflict exists with the Eighth Circuit in *Greenwood v. Ross*, 778 F2d 448, 457 (8th Cir. 1985), which holds that the filing of a civil rights lawsuit and discrimination charge with the Equal Employment Opportunity Commission is per se regarded as activity protected by the First Amendment. The Sixth Circuit appears to also adopt a per se rule when it holds that an individual filing of charge of discrimination is a filing on a personal rather than a public concern. Judge Martin, who dissented in *Rice* stated,

> "However, I also dissapprove of the majority's summary dismissal of Rice's claims of discriminatory conduct by a governmental employer. Allegations of race or sex discrimination by a public employer, even if such allegations are made by only

> a single employee, may frequently implicate matters of public concern and may therefore fall within the protection of the First Amendment. See *Connick*, 461 U.S. at 149 n. 8; *Matulin v. Village of Lodi*, 862 F2d 609, 612-13 (6th Cir. 1988). Because Rice's employee grievance involved an allegation of reverse sex discrimination, I dissent from the majority's affirmance of the district court's summary dismissal of Rice's first amendment retaliation claim. The Supreme Court has suggested that allegations of discrimination by a public employer are "a matter inherently of public concern," *Connick*, 461 U.S. at 149 n. 8. (A-13).

The majority in *Rice* stated:

> The Supreme Court has never directly addressed the extent to which an employment grievance like the one filed by Mr. Rice constitutes speech on a matter of public concern. Lower courts have sometimes assumed, often without extensive discussion, that because illegal discrimination against public employees is a matter of public concern, any adverse employment decision resulting from a complaint about such discrimination necessarily violates the First Amendment. [citations omitted]. (A-7,8).

By categorizing all communications regarding an employee's own situation as matters of private rather than public concern, the Sixth Circuit deviated from the framework this Court has evolved in recent precedent. *Connick v. Myers*, 461 U.S. 138 (1983).

The Sixth Circuit erected a false dichotomy. Communications motivated by personal concern may well involve matters of public concern. Mr. Rice alleged reverse sex discrimination in 1976, during a period when the public debate was just beginning on reverse discrimination. *Regents*

of University of California v. Bakke, 438 U.S. 265 (1978). Rice's grievance transcended his personal situation and affected not only how the state engaged in affirmative action, but also affected deep constitutional principles regarding the treatment of individuals and groups in our society.

The most likely motivation for speech on matters of public concern by a public employee will be his or her self-interest. The focus, however, must be on the nature of the speech, not the motivation of the speaker.

In addition, Mr. Rice's charges coupled with the state officials' retaliatory conduct ipso facto created a chilling effect upon other state employees who seek to vindicate their federal and constitutional rights.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the questions presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Ruzicho, a member of the bar of this court and counsel for petitioner herein, hereby certifies that three copies of the Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit have been served by certified mail, postage-paid, upon, counsel for respondents, David A. Kopech, Esq., 17 South High Street, Suite 707, Columbus, Ohio 43215 this 9th day of November 1989.

ANDREW J. RUZICHO

In the
United States Court of Appeals
For The Sixth Circuit

OCTOBER TERM, 1989

No. 86-3312

EDWARD E. RICE,

Plaintiff-Appellant

v.

OHIO DEPARTMENT OF TRANSPORTATION; DAVID L. WEIR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION; AND PATRICK McCRAY, DEPUTY DIRECTOR, ADMINISTRATIVE AFFAIRS, OHIO DEPARTMENT OF TRANSPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

DECIDED AND FILED OCTOBER 13, 1989

Before: MARTIN and NELSON, *Circuit Judges*, and CONTIE, *Senior Circuit Judge*.

NELSON, *Circuit Judge*, delivered the opinion of the court in which CONTIE, *Senior Circuit Judge*, joined. MARTIN, *Circuit Judge*, (pp.12-14) delivered a separate opinion concurring in part and dissenting in part.

DAVID A. NELSON, *Circuit Judge*. This is a federal civil

rights action brought by an employee of the Ohio Department of Transportation who alleged that he was passed over for promotion on the basis of considerations that were illegal under the First and Fourteenth Amendments. One of these considerations, the plaintiff claimed, was his failure to engage in political activity on behalf of the party that was in power at the time he was denied promotion.

The district court entered summary judgment for the defendants. Our disposition of the ensuing appeal was deferred pending consideration by the full court of the issues presented in *Messer V. Curci*, 881 F.2d 219 (6th Cir. 1989) (en banc), a case similar to this in certain respects. The panel renewed its deliberations in the present case following issuance of the decision in *Curci*, and for the reasons explained below we now affirm the judgment of the district court.

I

The plaintiff, Edward E. Rice, has been an employee of the Ohio Department of Transportation since 1969. For some time before the present action was filed in December of 1982, Mr. Rice held the position of Personnel Officer III at the Department's District 8 office in Lebanon, Ohio. The position is a "classified" one under the Ohio civil service laws.

In September of 1976 Mr. Rice filed a reverse sex discrimination charge against the Department before the Ohio Civil Rights Commission. The charge was resolved amicably. In August of 1981 a departmental employee who was an Administrative Assistant IV took a leave of absence, creating a temporary vacancy. On August 24, 1981, Mr. Rice was notified that he was receiving a temporary promotion to fill the administrative assistant position, which was "unclassified." Three days later Mr. Rice's supervisor rescinded the temporary promotion on orders from his superiors.

In due course it developed that the previous administrative assistant would not return from his leave of absence. A permanent vacancy was declared, and Mr. Rice made known his interest in filling it. The job went instead to one Andrew Siehl, the son of the Republican county chairman of Preble County, Ohio. Andrew Siehl was 26 years old. Mr. Rice was approximately twice that age.

Mr. Siehl took a temporary leave of absence in August of 1982, and he was replaced by another young man, James Fife. Plaintiff Rice was allegedly told by his supervisor that he (Rice) had been passed over because of his earlier sex discrimination charge and because he had failed to give enough money to the Republican Party.

Mr. Rice thereupon brought suit against the Department, its director, and its deputy director, asserting claims under the Age Discrimination in Employment Act and under 42 *U.S.C.* § §1983 and 1985. The defendants moved for summary judgment. The district court denied the motion with respect to the age discrimination claim (the only claim asserted against the Department), but the court granted summary judgment for the director and deputy director on the other claims. The age discrimination claim was subsequently dismissed by stipulation, making this appeal possible.

II

We first address Mr. Rice's claims under 42 *U.S.C.* §1983. That statute provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not "persons" within the meaning of §1983:

> "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166, 405 [sic] S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114 (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658,] 690, n. 55, 98 S.Ct. [2018,] 2035, n.55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.
>
> We hold that neither a State nor its officials acting in their official capacities are 'persons' under §1983."

Will v. Michigan Dept. of State Police, _ U.S. _, _, 109 S.Ct. 2304, 2311-12 (1989) (footnote omitted).

Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both "in their official and personal capacities," the record does not suggest in any way that the defendants' actions were somehow unofficial. The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued; congressional intent is not to be circumvented, *Will* says, "by a mere pleading device." But even if we were to assume that the defendants acted in a personal capacity --

and the district court made no finding on this point — we are persuaded, for reasons to which we now turn, that there could be no recovery here.

A

Mr. Rice contends that the defendants' consideration of political factors in deciding not to promote him violated his free speech rights under the First Amendment, as incorporated in the Fourteenth Amendment. At the time the district court rendered its decision, the law in this area was in a state of some uncertainty. Unable to find any Sixth Circuit authority directly on point, the district court analyzed a number of district court opinions, including *Messer v. Curci*, 610 F.Supp. 179 (E.D. Ky. 1985), and *Avery v. Jennings*, 604 F. Supp. 1356 (S.D. Ohio 1985). On the strength of those opinions, among others, the district court concluded that the First Amendment, as interpreted in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), prohibits only the firing of public employees for political reasons, and does not prohibit refusals to hire for political reasons.

Subsequent to the district court's decision, both *Avery* and *Messer* became the subject of opinions by this court. In *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), we said that "the first amendment prohibits official hiring policies based solely on political affiliation," and we interpreted *Elrod* and *Branti* as condemning, on constitutional grounds, "a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions." 786 F.2d at 234 and 237. Sitting *en banc*, however, we departed from *Avery* in *Messer v. Curci*, 881 F.2d 279 (6th Cir. 1989). *Messer* draws a sharp distinction between politically motivated firings and other types of personnel decisions — failure to hire or rehire, *e.g.* — based on political considerations. As far as hiring decisions are concerned, we held, the "allegation of political patronage . . .

standing alone, does not state a claim for violation of 42 *U.S.C.* §1983 . . . . " *Id.* at 220.

Messer is controlling here. We see no meaningful distinction, in the present context, between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendants' decision not to promote Mr. Rice was the product of precisely the sort of "preference for political supporters in government employment" that we found constitutionally permissible in *Messer*. *Id.* at 223. Under *Messer*, the district court's decision to dismiss this claim was clearly correct.

B

Mr. Rice raises a second claim under §1983, based on the theory that the decision not to promote him was taken partly in retaliation for his filing of the sex discrimination claim in 1976. Such retaliation, Mr. Rice contends, is unconstitutional.

The district court rejected this contention in reliance on *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). That case held that an action to vindicate rights secured by Title VII of the Civil Rights Act of 1984 must be brought under that statute, and not under §1983. Unlike the plaintiff in *Day*, Mr. Rice has not brought his §1983 retaliation claim to vindicate rights secured by Title VII; he seeks to vindicate rights he says are secured by the First Amendment to the Constitution. We pointed out in *Day* that a public employee "may sue . . . under both Title VII and §1983 when the §1983 violation rests on a claim of infringement of rights guaranteed by the Constitution." *Id.* at 1205 (citing *Grano v. Department of Development*, 637 F.2d 1073 (6th Cir. 1980)). *Day* is therefore not controlling in this case.

We are called upon here to decide whether the First Amendment itself, as made applicable to the states by the Fourteenth Amendment, prohibits the withholding of promotion in retaliation for the filing of an employment discrimination charge against a governmental employer.[1] It is beyond dispute that public employees may not "constitutionally be complelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interst." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). The threshold question in such cases, as the Supreme Court has recently emphasized, is whether the speech involves a matter of "public concern." *Connick v. Meyers*, 461 U.S. 138, 146 (1983); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); see also *Brown v. City of Trenton*. 867 F.2d 318, 321 (6th Cir. 1989). If the speech does not involve a matter of public concern, it is "unnecessary for us to scrutinize" the employment decision. *Connick*, 461 U.S. at 138. Not every job-related grievance of a public employee is a matter of public concern. In *Connick*, for example, the issues raised by the plaintiff's circulation of a questionnaire among her co-workers were "mere extensions of [the plaintiff's] dispute over her transfer" to another position, not issues of broader interest to society at large. *Id.* at 148.

The Supreme Court has never directly addressed the extent to which an employment grievance like the one filed by Mr. Rice constitutes speech on a matter of public concern. Lower courts have sometimes assumed, often without extensive

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[1]For the first time on appeal, Mr. Rice suggests that the allegedly retaliatory failure to promote also violated his right to due process and his rights under the Equal Protection Clause. These provisions of the Fourteenth Amendment were not mentioned in Mr. Rice's complaint as a basis for the retaliation claim, and were not otherwise relied upon in the proceedings before the district court. We shall not consider them here.

discussion, that because illegal discrimination against public employees is a matter of public concern, any adverse employment decision resulting from a complaint about such discrimination necessarily violates the First Amendment. See *Greenwood v. Ross*, 778 F.2d 448, 456-57 (8th Cir. 1985); *Christensen v. Lawrence F. Quigley Memorial Hospital*, 656 F.Supp. 14, 19 (D.Mass. 1985); *Fuchilla v. Prockop*, 682 F.Supp. 247, 261-62 (D.N.J. 1987); *Brown v. Town of Allenstown*, 648 F.Supp. 831, 839 (D.N.H. 1986); *cf. Owens v. Rush*, 654 F.2d 1370, 1377-80 (10th Cir. 1981) (male employee fired for assisting wife with her discrimmination charge).

In *Yatvin v. Madision Metropolitan School District*, 840 F.2d 412 (7th Cir. 1989), which, like this, was a failure-to-promote case, the Court of Appeals for the Seventh Circuit took a somewhat different approach. Although it may be "natural for lawyers to suppose that every legal pleading, however humble, comes trailing clouds of First Amendment glory," the Seventh Circuit said, this quaintly Wordsworthian supposition is simply untenable. *Id.* at 420. Some litigation, such as litigation to eliminate school segregation, clearly constitutes speech on a matter of public concern, see *NAACP v. Button*, 371 U.S. 415 (1963), but the legal action commenced by the plaintiff in *Yatvin* had been instituted "to advance her career, not promote a cause." *Yatvin*, 840 F.2d at 419. The *Yatvin* plaintiff could not invoke the protection accorded "public concern" claims, because she had made no attempt to distinguish her case from the "run-of-the-mine single-plaintiff discrimination case." *Id.* at 420.

In the instant case, similarly, plaintiff Rice has made no attempt to distinguish his 1976 reverse discrimination charge from the run-of-the-mine single-plaintiff discrimination case. Unlike the plaintiff in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), who was simply "speak[ing] out as a citizen on a matter of general concern" in protesting to her employer about what she saw as its racially discriminatory policies, see *Connick*, 461 U.S. at 149 n. 8,

Mr. Rice was not "speak[ing] out as a citizen" when he filed his reverse discrimination charge. Mrs. Givhan's protests to her employer, the Supreme Court thought it important to note, were "not tied to a personal employment dispute . . . " *Connick*, 461 U.S. at 149 n. 8. The personal reverse discrimination charge filed by Mr. Rice, in contrast, was part and parcel of Mr. Rice's own "personal employment dispute." If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional.

Messer is a stronger case, in this respect, than the case presented by Mr. Rice. If a state may constitutionally refuse to hire an employee because of the employee's political philosophy and associations, it is difficult to see why a state may not consitutionally refuse to promote an employee for filing an individual grievance on a matter that does not implicate the employee's political philosophy and associations.

This court has previously held that a public employee's public discussion of charges that her government employer discriminated against women constituted speech on a matter of public concern. *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988). We stressed in *Matulin* that the plaintiff was merely responding to media inquiries about "an existing controversy." *Id.* at 613. In the present case, by contrast, the record does not reveal the existence of a public controversy concerning allegations of reverse sex discrimination at the Ohio Department of Transportation.

The plaintiff has called our attention to a number of cases decided under statutes other than § §1983 and 1985, but those cases are not in point. The question presented by Mr. Rice's §1983 claim is whether the defendants deprived Mr. Rice of a right secured by the United States Constitution. It does not detract from the seriousness of Mr. Rice's

retaliation claim to say, as we are constrained to say, that it simply is not a claim arising under the First Amendment.

III

Mr. Rice relies, finally, upon 42 *U.S.C.* §1985(3), which provides, in pertinent part, as follows:

> "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

This statute requires a showing of "some racial, or perhaps other class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); see also *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1963). Although the Supreme Court has stated that "it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause," *Scott*, 463 U.S. at 836, there is a line of Sixth Circuit cases holding that a group of persons holding similar political views

can be a "class of persons" for purposes of §1985(3). See *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) ("clearly defined classes, such as supporters of a political candidate," come within §1985(3)); *Glasson v. City of Louisville*, 518 F.2d 899, 911-12 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

Conklin, *Cameron*, and *Glasson* suggest that all registered Republicans would constitute a clearly defined "class of persons" for purposes of §1985(3). Mr. Rice, however, does not claim he was discriminated against for not being a registered Republican; Mr. Rice is a Republican, as it happens, and insofar as § 1985 is concerned his claim is that he was conspired against simply "because of lack of political activity in the Republican Party . . . "

The degree of political activity engaged in by members of the same political party is too uncertain a standard, in our view, for delineating "clearly defined classes" of the sort §1985 was designed to protect. Noting that "there is no indication that plaintiff is a member of any class which has historically been entitled to Fourteenth Amendment protection," the district court concluded that Mr. Rice was not a member of a "discrete group" against whom the defendants' alleged conspiratorial animus was directed. We agree.

The judgement of the district court is **AFFIRMED**.

BOYCE F. MARTIN, JR., *Circuit Judge*, concurring in part and dissenting in part. I reluctantly concur in the majority's holding that, under the authority of *Messer v. Curci*, _ F.2d _ (6th Cir. 1989) (en banc), the district court did not err in its dismissal on summary judgment of Rice's §1983 claim for failure to promote. Although I disagreed with the decision in *Messer* for the reasons stated in my dissenting opinion in that case, *Messer* is controlling here and mandates the affirmance of the district court's judgment.[1]

However, I dissent from the majority's holding that the district court correctly dismissed Rice's §1983 claim that the defendants' decision not to promote him, which was allegedly taken in retaliation for his filing a reverse sex discrimination charge, violated the first amendment. The Supreme Court has not yet explicitly decided whether the first amendment prohibits the withholding of promotion in retaliation for the filing of an employment discrimination charge against a governmental employer. In several previous cases, the Court has applied a general balancing test to determine whether a public employee's speech requires constitutional protection. *Rankin v. McPherson*, 483 U.S. 378 (1987). The threshold question in applying this balancing test is whether the public employee's speech may be characterized as constituting speech on a matter of "public concern," as determined by the content, form and context of the speech. *Connick v. Myers*, 461 U.S. 138, 146-48 (1983). Thus, the question raised by this appeal is whether Rice's speech, as evidenced by his employment discrimination charge against the defendants, constitutes speech on a matter of "public concern."

I cannot agree with the majority's decision that Rice's retaliation claim does not constitute speech on a matter of public concern and therefore is not a claim arising under the first amendment. Admittedly, not every employment-

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[1]I also concur without comment on the majority's affirmance of the district court's dismissal of Rice's claim under Section 1985(3).

related grievance of a public employee raises a matter of public concern under the first amendment; I consequently disagree with the Eighth Circuit's broad rule that the filing of a civil rights lawsuit and discrimination charge with the Equal Employment Opportunity Commission are per se regarded as activities protected by the first amendment. *Greenwood v. Ross*, 778 F.2d 448, 456-57 (8th Cir. 1985). However, I also disapprove of the majority's summary dismissal of Rice's claims of discriminatory conduct by a governmental employer. Allegations of race or sex discrimination by a public employer, even if such allegations are made by only a single employee, may frequently implicate matters of public concern and may therefore fall within the protection of the first amendment. *See Connick*, 461 U.S. at 149 n.8; *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988). Because Rice's employee grievance involved an allegation of reverse sex discrimination, I dissent from the majority's affirmance of the district court's summary dismissal of Rice's first amendment retaliation claim.

The Supreme Court has suggested that allegations of discrimination by a public employer are "a matter inherently of public concern." *Connick*, 461 U.S. at 149 n.8. While the granting of summary judgment in this case does not substantially reduce access to the federal courts, it does begin to erode this opportunity for plaintiffs such as Rice.[2]

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[2]Even in *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), the case primarily relied upon by the majority, the district court did not summarily dismiss the plaintiff's first amendment retaliation claim. The dismissal of first amendment claims on summary judgment may effectively preclude plaintiffs, such as Rice, from establishing a viable first amendment claim by preventing them, as the Seventh Circuit required in *Yatvin*, from distinguishing their cases from the "run-of-the-mill single-plaintiff discrimination case." *Yatvin*, 840 F.2d at 420.

Accordingly, I dissent from the majority's decision to uphold the district court's grant of summary judgment to defendants on Rice's first amendment claim.